

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

No. 74-2299

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2299

REID L. FELDMAN, Adm'r.,
Plaintiff-Appellee-Cross Appellant,

v.

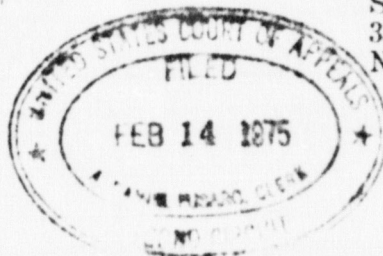
ALLEGHENY AIRLINES, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the
District of Connecticut

BRIEF OF PLAINTIFF

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2



INDEX

	Page
STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF CASE	2
A. Decedent's Background and Employment	4
B. District Court's Findings on Damages	8
1. Destruction of Decedent's Earning Capacity	8
2. Destruction of Decedent's Capacity To Enjoy Life's Activities	12
3. Deduction of Decedent's Necessary and Per- sonal Living Expenses	12
ARGUMENT	
I. THE DISTRICT COURT'S FINDINGS ON THE DESTRUC- TION OF DECEDENT'S EARNING CAPACITY WERE CONSERVATIVE AND, IN ANY EVENT, CLEARLY WITHIN THE COURT'S DISCRETIONARY FACT-FIND- ING AUTHORITY	15
A. Decedent's Starting Salary in Washington	15
B. Decedent's Salary Increases and Final Sal- ary Level	18
C. Projected Earning Capacity During Dece- dent's Child-Rearing Years	23
II. THE DISTRICT COURT'S FINDING OF A 1.5% DIS- COUNT RATE CONSTITUTED A PROPER EXERCISE OF ITS FACT-FINDING RESPONSIBILITIES	26
A. Connecticut Treats the Discount Rate as an Issue of Fact and Accords Broad Flexibility Thereon to the Trial Court	29
B. The Court's Finding of a 1.5% Discount Rate Properly Reflected the Particular Facts of This Case	30

	Page
C. The 1.5% Discount Rate Is Also Supported by the Court's Conservative Resolution of Other Factors Affecting the Level of Recovery	37
D. In the <i>Perry</i> Case, Involving the Same Airplane Crash, the Second Circuit Gave Significant Support to the Present Use in Connecticut of a 1.5% Discount Rate	42
III. THE DISTRICT COURT'S AWARD OF DAMAGES WAS CLEARLY NOT EXCESSIVE	45
CONCLUSION	50
APPENDIX A: U.S. Department of Labor, November 1, 1974 Consumer Price Index	1a
APPENDIX A-1: U.S. Department of Labor, December 1974, Consumer Price Index	2a
APPENDIX B: July 1, 1971, Government GS Pay Schedule (P. Ex. 16 — Ex. R3 to Rodmann Deposition)	3a
APPENDIX C: October, 1974, Government GS Pay Schedules	4a

TABLES OF AUTHORITIES CITED

CASES:

<i>Alexander v. Nash-Kelvinator Corporation</i> , 271 F.2d 524 (2d Cir. 1959)	36
<i>Beaulieu v. Elliott</i> , 434 P.2d 665 (Alaska 1971)	33-34
<i>Bigelow v. RKO Radio Pictures</i> , 327 U.S. 251 (1946)	18, 23, 40
<i>Boston & M.R.R. v. Talbert</i> , 360 F.2d 286 (1st Cir. 1966)	39
<i>Brennan v. Arnheim & Neely, Inc.</i> , 410 U.S. 512 (1973)	3
<i>Butler v. Steck</i> , 146 Conn. 114, 148 A.2d 246 (1959) ..	18
<i>Chase v. Fitzgerald</i> , 132 Conn. 461, 45 A.2d 789 (1946)	24, 29
<i>Chesapeake & Ohio R. Co. v. Kelly</i> , 241 U.S. 485 (1916) ..	10
<i>Clifford v. McCloskey</i> , 13 N.J. Super. 96, 80 A.2d 134 (1951)	37

	Page
<i>Cooley v. Crispino</i> , 21 Conn. Supp. 150, 147 A.2d 497 (Conn. Superior Ct. 1958)	35
<i>Cully v. Pennsylvania R.R.</i> , 244 F.Supp. 710 (D. Del. 1965)	39
<i>Curry v. Pennsylvania R.R.</i> , 388 F.Supp. 1219 (N.D. Cal. 1971)	33
<i>Dagnello v. Long Island R.R.</i> , 289 F.2d 797 (2d Cir. 1961)	14, 45
<i>Darling v. Burrone Bros., Inc.</i> , 162 Conn. 187, 292 A.2d 912 (1972)	35
<i>Davis v. P. Gambardella & Son Cheese Corporation</i> , 147 Conn. 365, 161 A.2d 583 (1960)	24
<i>Eric R. Co. v. Tomkins</i> , 304 U.S. 64 (1938)	26
<i>Fairbanks v. State</i> , 143 Conn. 653, 124 A.2d 893 (1956) 14, 23, 26, 32, 48	
<i>Floyd v. Fruit Industries, Inc.</i> , 144 Conn. 659, 136 A.2d 918 (1957)	12, 23, 30, 45
<i>Fuchstadt v. United States</i> , 434 F.2d 367 (2d Cir. 1970)	34
<i>George W. B. Bryson & Co., Ltd. v. Norton Lilly & Co.</i> , 502 F.2d 1045 (5th Cir. 1974)	13
<i>Halloran v. New England Telephone & Telegraph Co.</i> , 95 Vt. 273, 115 A. 143 (1921)	37
<i>Hurst v. Chicago B. & Q. R. Co.</i> , 280 Mo. 566, 219 S.W. 566 (1920)	37
<i>In Re Sincere Navigation Corp.</i> , 329 F.Supp. 652 (E.D. La. 1971)	33, 37
<i>Jackiewicz v. United Illuminating Co.</i> , 106 Conn. 310, 138 A. 151 (1927)	24, 29
<i>Lane v. United Electric Light & Water Co.</i> , 90 Conn. 35, 96 A. 155 (1915)	30
<i>LeRoy v. Sabena Belgian World Airways</i> , 344 F.2d 266 (2d Cir. 1965)	39, 41
<i>Local Union 1219 v. United Bro. of Carpenters & Join- ers</i> , 493 F.2d 93 (1st Cir. 1974)	14, 35
<i>Petition of Marina Mercante Nicaraguense</i> , 248 F. Supp. 15 (S.D. N.Y. 1965)	38, 41, 46
<i>Petition of Marina Mercante Nicaraguense</i> , 364 F.2d 118 (2d Cir. 1966)	38, 41
<i>Petition of Marine Sulphur Transport</i> , (S.D. N.Y.) July 31, 1974 (Slip Op.)	38, 39, 40, 41, 42
<i>McKirdy v. Cascio</i> , 142 Conn. 80, 101 A.2d 555 (1955) 24, 46	

	Page
<i>McWeeney v. New York, N.H. & H. R.R. Co.</i> , 282 F.2d 34 (2d Cir. 1960)	38, 47
<i>O'Connor v. United States</i> , 269 F.2d 578 (2d Cir. 1959)	14, 26, 29
<i>Perry v. Allegheny Airlines, Inc.</i> , 489 F.2d 1349 (2d Cir. 1974)	4, 28, 42-44, 47, 48-49
<i>Quednau v. Langrish</i> , 144 Conn. 706, 137 A.2d 544 (1957)	35
<i>Rapsiardi v. United Fruit Company</i> , 441 F.2d 1308 (2d Cir. 1971)	36
<i>Scruggs v. Chesapeake & Ohio Railway Co.</i> , 320 F.Supp. 1248 (W.D. Va. 1970)	37
<i>Shanks v. United States</i> , (M.D. La.) December 18, 1974 (Slip Op.)	39
<i>Snodgrass v. Nelson</i> , 503 F.2d 94 (8th Cir. 1974)	13
<i>Story Parchment Co. v. Paterson Co.</i> , 282 U.S. 555 (1931)	18, 40
<i>Terkildsen v. Waters</i> , 481 F.2d 201 (2d Cir. 1973)	21, 22, 48
<i>Texas Consolidated Transportation Corporation v. Eubanks</i> , 340 S.W.2d 830 (Tex. Civ. App. 1960) ..	37
<i>United States v. Yellow Cab Co.</i> , 338 U.S. 338 (1949) ..	35
<i>United States v. 105.22 Acres of Lane</i> , 498 F.2d 8 (2d Cir. 1974)	13, 49
<i>Waldron v. Raccio</i> , Conn. L.J. July 9, 1974, p. 6 (Conn. Supreme Court)	30, 45, 46, 47
<i>Zenith Corp. v. Hazeltine</i> , 395 U.S. 100 (1969)	13

STATUTES AND RULES:

84 Stat. 1946 (1971), 5 U.S.C. §§ 5301-5305	19, 32
Rule 52(a) of Federal Rules of Civil Procedure ..	3, 13, 14
Conn. Gen. Stats. § 52-555	3, 11, 27

OTHER AUTHORITIES:

22 Am. Jur. 2d § 87, p. 125	24, 36-37
25A C.J.S., § 185.6, pp. 231-32; § 100, p. 901	37
5A Moore Federal Practice, § 52.03(1), p. 2627 (1974) ..	34
Federal Personnel Manual, Chapter 53, Subchapter 4, Sec. 4-12	22
Stern, <i>When to Cross Appeal or Cross-Petition—Certainty or Confusion</i> , 87 Harv. L. Rev. 763 (1974) ..	3
6 Univ. San. Francisco L. Rev. 311 (1974)	37

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v.

ALLEGHENY AIRLINES, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the
District of Connecticut

BRIEF OF PLAINTIFF

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. In a Connecticut wrongful death case, did the District Court, sitting without a jury, abuse its discretion in finding that the post-mortem, first-year earnings for the decedent in Washington, D. C. legislative work would be \$15,040, when, as a college graduate, she had had almost two years of similar, increasingly responsible work in Connecticut?

2. Did the District Court abuse its discretion in finding that decedent's future merit salary increases, in Washington legislative work, would have averaged about 3% per year?

3. Was it permissible, under a Connecticut law which bases recovery on the destruction of earning *capacity*, as distinguished from a loss of earnings per se, for the District Court to credit the decedent with her salary (on a no-raise basis) during the eight-year period she planned to devote herself primarily to rearing two children before returning to her full-time career?

4. In a highly inflationary period, was it an abuse of the District Court's fact-finding discretion to find a discount rate of 1.5% by subtracting the historic 34-year inflation rate from the historic 34-year safe investment rate when there was evidence supporting the 1.5% figure as correct, when the decedent was reasonably assured of substantial cost-of-living increases, when the Court specifically excluded all such increases from its projections of future earnings and when there were other countervailing factors and findings which reduced plaintiff's recovery?

5. Was the judgment of \$444,056 appropriate for the decedent's death from burns and asphyxiation which resulted in the destruction of the capacity of a 25-year old woman to earn substantially and to enjoy life when she had a record of career achievements, recognition and ambition plus wide interests and a happy life?

STATEMENT OF THE CASE

This is an appeal by the defendant Allegheny Airlines, Inc., ("Allegheny"), from a judgment of \$444,056 awarded to the plaintiff, Reid Laurence Feldman, as administrator of the estate of his wife, Nancy Hollander Feldman, by the United States District Court for the District of Connecticut. That Court, sitting without a jury, had made this

award to Mrs. Feldman's estate for damages resulting from her death in the crash of Allegheny Flight 485 in the fog near New Haven on June 6, 1971 (App. 11a-79a;¹ *Feldman v. Allegheny Airlines, Inc.*, 382 F.Supp. 1271 (D. Conn. 1974)). The District Court subsequently denied Allegheny's Motion for a New Trial.

Liability having been conceded, Allegheny's appeal from District Judge M. Joseph Blumenfeld's decision seeks to overturn the findings on damages.² Allegheny challenges both the \$344,056 awarded for total destruction of the 25-year old decedent's future earning capacity and the \$100,000 awarded for the destruction of her capacity to enjoy life's pleasurable, non-remunerative activities during her remaining 52 years' life expectancy. Yet, Allegheny, by never referring to Rule 52(a) of the Federal Rules of Civil Procedure, fails to recognize, much less to carry, the heavy burden imposed on Allegheny by the Rule—namely, that the District Court's careful findings of fact on the damage issues must be affirmed unless they can be shown to be "clearly erroneous."

Plaintiff's diversity suit sought recovery under Connecticut's wrongful death statute. Conn. Gen. Stats. § 52-555. That law is a "survival" statute, which allows recovery by the estate of the damages sustained by the decedent.

¹ "App." refers to Appellant's Appendix.

² Plaintiff has filed a cross-appeal primarily to clearly enable him to argue that, if this Court were inclined to adopt some of Allegheny's points about reducing the award below, there were other damage elements, not recognized by the District Court, which would offset any such disallowance and thus fully justify a judgment of at least \$444,056. See *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512 (1973); Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion*, 87 Harv. L. Rev. 763 (1974). Plaintiff does not appeal from the dismissal of that part of the complaint which sought damages for himself personally; that claim, which was not pursued at trial, was separate from the damages sought by plaintiff as representative of his wife's estate.

Prior to trial, Allegheny admitted liability and plaintiff dropped his claim for punitive damages (App. 7a). Subsequently, the parties having waived a jury trial, the case was tried before Judge Blumenfeld. That Judge had also presided at the earlier trial in the *Perry* case, which arose out of the same crash, which involved a 38-year old man and a waiver of punitive damages, and which resulted in a jury verdict of \$369,000 against Allegheny. The award in that case and the Judge's charge to the jury were subsequently upheld by this Court in a decision rendered prior to the trial below. *Perry v. Allegheny Airlines, Inc.*, 489 F.2d 1349, 1353 (2d Cir. 1974).

A. Decedent's Background and Employment

There was strong evidence from a variety of highly complimentary witnesses about the decedent's outstanding record and prospects for a successful professional career and happy life. Allegheny called no witness who had met the decedent or was familiar with her work. Since Judge Blumenfeld's specific findings on damages are closely connected with decedent's background and employment record, the following unchallenged findings are particularly noteworthy:

"Nancy Hollander was reared in a Maryland suburb of Washington, D. C. and entered the University of Pennsylvania as a freshman in 1964. Her grades in college rose steadily from a "C" average as a freshman to a "B" and "B+" average in her upper division years, leaving her with a cumulative "B" average of 2.94 on a scale of "A" = 4. She was the recipient of a Department of Justice scholarship throughout college, and was active in student government. She was also involved in the nether reaches of the federal government for four successive summers during her college years. She began as a secretary for the National Institute of Health in 1964, and spent the next three summers in the Office of the Solicitor of the Department of Labor, rising from legal secretary to research assistant to budget analyst by the summer of 1967.

Shortly after receiving her Bachelor of Arts degree in English Literature in May of 1968, she married plaintiff and accompanied him that fall to New Haven, Connecticut, where he commenced studies at Yale Law School.

Ante-Mortem Employment

Mrs. Feldman's employment in New Haven reflected a continuing interest in and ability to obtain work relating to governmental functions and processes. After some temporary secretarial jobs she secured a position as a research assistant with the New Haven Legal Aid Association. Her principal task there was development of cost-benefit analysis of the Association's operations. She also performed para-legal research work, such as preparing studies of residents of New Haven neighborhoods when such data was pertinent to litigation being conducted by the Association. The following summer of 1969 she worked for Equal Employment Opportunities Commission in Washington. In September of 1969 she joined the urban affairs consulting firm of Cogen, Holt & Associates (Cogen, Holt) as a professional associate, and remained in this position until her death.

Cogen, Holt had been formed in 1968 by, among others, Joel Cogen, formerly General Counsel to the New Haven Redevelopment Agency. When the decedent became associated with the firm in 1969, it had a total staff of about ten persons, and has since nearly tripled in size. Clients include Yale-New Haven Hospital, the Yale School of Medicine, private foundations, and public housing and redevelopment authorities. In addition the firm provides complete staff services for the Connecticut Conference of Mayors and Municipalities, an organization representing cities and towns before Congress, the state legislature, and state and federal administrative agencies, acting basically as a lobbyist for municipal interests.

Mrs. Feldman's work with Cogen, Holt involved her principally with the Conference of Mayors. She began as a legislative analyst doing research for other members of the firm, but as she acquired experience she

worked more directly with the client and with the targets of the client's lobbying. In the words of Mr. Cogen, who himself serves as Executive Director of the Conference, 'there was this thread of research analysis administrative work that gradually increased in the responsibility and, in fact, in exposure to the public. It was in the closing days of her work for us that she had become increasingly involved in highly complex legislation and, in fact, at the very end was working very closely with the legislators, members of the General Assembly, and indeed was doing direct lobbying at the State Capitol in the last days she worked for us.'

Her interest in her work was intense; she worked hard and enthusiastically and genuinely impressed her employers. Mrs. Kathryn Feidelson, another partner in Cogen, Holt who worked with the decedent on projects for the Conference of Mayors, testified that she had 'a remarkable degree of analytic ability, a skill in using numbers, statistical analysis. But apart from the intellectual skills she had personal skills which made her able to deal with a wide variety of people, as well as administrative skills, a thorough commitment, a sense of responsibility, a talent for following up projects in which she was working.'

Mr. Clarence Heimann, currently Director of Project Development for the Connecticut Resources Recovery Authority, was First Selectman for Trumbull, Connecticut, for the twelve years from 1961 to 1973. He was president of the Connecticut Conference of Mayors and Municipalities in 1971 and 1972, and was vice-president of that organization in 1970. In these capacities he dealt directly with the decedent. He was 'very much impressed' with her abilities: 'I would describe her as being an attractive and intelligent and articulate person; someone who had the ability to order her thoughts and to be able to present them in a fashion that people could readily understand. She had a unique ability, in my opinion, in this area. As a relatively young person she seemed far more mature than her age in her ability to engender thinking and to encourage participation by people who were, in many cases, her superior in age and perhaps station in life.'

The circumstances leading to Mrs. Feldman's death are illustrative of her commitment to work. She and her husband having both grown up in the metropolitan Washington area, they had determined to settle there. She had accordingly arranged to leave Cogen, Holt for what she anticipated would be similar employment in Washington, and had begun exploring opportunities in Washington for employment as a legislative analyst. For instance, she had approached a representative of the United States Conference of Mayors who was attending the annual meeting of the Connecticut Conference of Mayors, and had gained an optimistic impression of her chances of employment with the United States Conference of Mayors. She also had an alternative field of endeavor open to her, since she had applied to and been accepted by the George Washington University Law School for admission in the fall of 1971. Her husband having finished law school, she drove him and their belongings to Washington on the first week-end in June 1971, as he was about to take the District of Columbia bar examination. But her contribution to Cogen, Holt had become significant enough for her presence there to be required for one last week, notwithstanding her change of residence. In Mr. Cogen's words, 'we had three days left in the [legislative] session and she was handling some very crucial legislation on which she had done the research, analysis, the drafting, and she had close contacts with the key legislators on those bills and we needed her back because it was essential to get those bills passed.' Mrs. Feldman accordingly embarked on Allegheny's morning flight to New Haven on the Monday after the couple's move to Washington.

Ante-Mortem Earnings

The decedent's earnings during her years in New Haven corroborate her employers' testimony as to her professional competence and her bright prospects for employment and advancement in the Washington milieu. During the approximately nine months she worked for New Haven Legal Assistance, she earned \$5,054.62, which reflects an annual rate of approxi-

mately \$6,700. Her summer job with the EEOC in 1969 earned her \$991.71 and various other odd jobs brought her total earnings for the year beginning September 1968 to \$6,544.33. Her starting salary in September 1969 at Cogen, Holt was \$6,500. Her salary was increased to \$7,500 in May 1970 to \$9,000 in November 1970, and finally to \$10,000 in May 1971. In just 20 months at Cogen, Holt her salary thus rose by 54 per cent. Mr. Cogen stated that had she remained at Cogen, Holt the decedent would have continued to receive annual raises of at least \$1,000 per year and possibly substantially more to reflect cost of living increases. For example, the young woman hired to replace Mrs. Feldman began at \$10,000 per year but was given an increase to \$13,500 about one year later." (App. 11a-16a) (footnotes omitted).

B. District Court's Findings on Damages

The District Court's findings on damages constitute a model of careful and lucid reasoning:

1. Destruction of Decedent's Earning Capacity

The Court started with a finding that decedent would have earned \$15,040 in her first year in legislative work in Washington (App. 29a). Her recent work at the Cogen, Holt firm corresponded closely with the job description for a "legislative counsel" job in Washington for non-lawyers with the National League of Cities/United States Conference of Mayors (NLC/USCM), which paid, at that time, between \$15,040 and \$27,000. Furthermore, decedent had been earning \$10,000 a year in New Haven, had received salary increases there of 54% in only 20 months, and both the opportunities and salary scales for legislative work were greater in Washington than in New Haven (Cogen, App. 133a-141a; P. Ex. 17—Rodmann Dep., pp. 11, 18;³

³ This reference is to the deposition of Mrs. Rodmann, which is part of the record transmitted to this Court and which was received in evidence as Plaintiff's Exhibit 17 (Trial Tr. 147-50).

App. 28a-29a). Prior to her death, the decedent had made an informal approach to the NLC/USCM about a Washington professional job and had received an encouraging response (Feldman, App. 98a-99a).

The Court's findings on the length of decedent's prospective earning capacity were controlled by agreements of the parties. They had agreed that decedent was 25 years old and in good health at the time of her death, that a white woman of 25 would have an additional 52 years of life expectancy and that she would retire at 65 (App. 33a, 80a; Malasky, App. 186a; Curran, App. 259a; see also, D. Ex. F, p. 6). The Court therefore found that decedent could look forward to 40 more years of future earning capacity (App. 33a).

The Court treated the matter of salary increases with caution. First of all, by using 1971 salary tables the Court based the value of decedent's lost earning capacity entirely on 1971 dollars (App. 31a; 34a; 35a; 43a). It excluded all subsequent cost-of-living raises, even though decedent's likely immediate employer, the NLC/USCM, regularly gave such increases (App. 43a; P. Ex. 17—Rodmann Dep., p. 12). Indeed, between July 1, 1971 and the April, 1974 trial such pure cost-of-living raises actually given by NLC/USCM had amounted to about 15% for all employees or around 5%-6% per year (P. Ex. 17—Rodmann Dep., p. 12).

Second, the Court found it likely that decedent would have received, until retirement, annual "merit" increases averaging about 3% per year (App. 30a-32a; 54a-55a). This meant that decedent, at the age of 40, would be earning \$18,046, at 55, \$27,061, and at 65, \$33,757 (See Table I, App. 54a-55a; see also App. 34a-35a).

The Court also gave careful attention to decedent's expected short absence from full time work to rear two chil-

dren (App. 32a-33a). Plaintiff and his wife had planned to have two children; his wife expected, at the age of 30, to devote herself principally to having and raising the children for a period of from four to eight years before returning to full-time work (Feldman, App. 101a-103a). The Court held that, since decedent's earning capacity during this period had been destroyed by Allegheny, her estate should be credited with the amount which she was *capable* of earning during those child-raising years. However, the Court froze decedent's annual loss of earning capacity at \$17,044 throughout this period (App. 25a, 33a, 54a).

Having thus determined the value of decedent's loss of earning capacity on an annual basis to retirement, the Court gave no credit to the estate for full-time or part-time work or for pension payments after retirement (App. 33a-34a; 55a).

The Court then applied an income tax deduction of 25% for each year in which decedent's estate was credited with lost earning capacity (App. 35a). The Court could then determine the net value of decedent's lost earning capacity on an annual basis (Table I, App. 54a-55a).

The Court next found the appropriate discount rate so as to reduce the decedent's lost earning capacity to its present value (App. 36a-55a). It weighed conflicting expert testimony, analyzed pertinent economic statistics over many years, and then, exercising the discretion which Connecticut and this Court leave to the trier of facts, selected 1.5% as the correct figure (App. 43a-49a; 54a-55a). The District Court found that the 1.5% rate represented the real yield on safe investments—one which reflected "the earning power of money." *Chesapeake & Ohio R. Co. v. Kelly*, 421 U.S. 485, 491 (1961) (App. 37a, 48a-49a). In making this finding, the Court sought to filter out the effect of infla-

tionary expectations from investment yields just as the Court had excluded inflation-caused increases from its findings on decedent's loss of future earning capacity (App. 43a-49a). Therefore, in the appendix to its decision, the Court subtracted, over long and corresponding periods of years, the annual increases in the cost of living from the effective annual interest rates on a series of safe Treasury Bill investments (App. 71a-79a). The difference between these two percentages supported closely the 1.5% discount figure, which plaintiff's expert had advanced (App. 45a-46a).

The Court, accordingly, made the following finding:

"... [T]hat 1.5 per cent per year is an appropriate figure by which to discount an award of damages based on the destruction of future earning capacity when that award has itself been computed without consideration of inflation affecting that amount subsequent to the date of the injury upon which the award is premised. To expect a prudently invested award to return a real yield of more than 1.5 per cent per year and accordingly to discount in advance by more than 1.5 per cent per year, an amount found to be fair compensation—in the absence of inflation—for damages suffered, would be to deny to the decedent's estate in a wrongful death action 'the just damages' to which (in Connecticut) it is statutorily entitled. Conn. Gen. Stats. § 52-555." (App. 48a-49a).

Using the 1.5% discount rate, the Court then applied the appropriate percentage to each year's after-tax loss of earning capacity. This produced a present value on July 1, 1974 for each of decedent's years from 1972 to 2011, the date of her prospective retirement (Table I, App. 54a-55a). The Court added up these yearly values to arrive at a total present value of \$499,953 for Allegheny's destruction of decedent's earning capacity.

2. Destruction of Decedent's Capacity to Enjoy Life's Activities

The District Court then turned to the destruction of decedent's capacity to carry on enjoyable, non-remunerative activities. *Floyd v. Fruit Industries, Inc.*, 144 Conn. 659, 669-70, 136 A.2d 918, 924, 925 (1957). As the Court found, the decedent had "the capacity to enjoy the myriad activities life offers outside of working hours." These included such things as cycling, skiing, tennis, entertaining and being entertained and traveling (App. 55a-56a). She was, again in the Court's words, "happy and well-adjusted, and attractive in appearance." Furthermore, "she was in good health and could be expected to live out the 52 years remaining in her expected life span." (App. 56a). The Court then proceeded to make what it conceded was a conservative award of \$100,000 on this aspect of the case (App. 57a); this amounts to about \$40 dollars a week for decedent's life expectancy.

3. Deductions of Decedent's Necessary Personal Living Expenses

The Court found that decedent's necessary living expenses were deductible even though she was a married woman (App. 60a-61a). It fixed decedent's first year living expenses in Washington at \$2,750 per year, which was 25% higher than the Court's finding as to her comparable expenses in New Haven (App. 63a-64a). The Court then increased those living expenses by 3% per year up to \$6,675 at the time of retirement (App. 64a, Table II, App. 67a-68a). After retirement, the Court continued to deduct living expenses of \$5,000 per year (App. 65a-68a). The Court then reduced the living-expense deductions to present value by application, as both parties had urged, of the same 1.5% discount rate used in connection with lost earning capacity (App. 66a-67a). This produced total

annual deductions for living expenses of \$156,897 (App. 68a). The subtraction of that amount from the sum of the \$499,953 (damages for destruction of earning capacity) and of the \$100,000 (damages for destruction of capacity to enjoy life's activities) resulted in the final judgment figure of \$444,056 (App. 69a).

The Court allowed no recovery for pre-judgment interest, or for pain and suffering, even though on the latter point, the Court conceded that there was evidence to support such a finding given the facts that the aircraft did not explode on impact, that decedent died of smoke asphyxiation and burns, that she had no broken bones and that Allegheny introduced no contrary evidence (App. 57a-60a).

ARGUMENT

Under Rule 52(a) it is settled that the scope of appellate review in a case of this kind, where virtually all the damage issues are factual, is very narrow. Findings cannot be set aside unless "clearly erroneous." *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 123 (1969); *Snodgrass v. Nelson*, 503 F.2d 94, 95 (8th Cir. 1974). The trial court has broad discretion; the Court of Appeals cannot act *de novo*. *United States v. 105.22 Acres of Land*, 498 F.2d 8, 9 (2d Cir. 1974). Thus, a finding cannot be set aside merely because a different finding would have been equally appropriate under the evidence. *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949). Similarly, a finding will be affirmed if "reasonable minds could possibly differ with the Court's conclusion, but the district court was *not* clearly wrong." *George W. B. Bryson & Co. Ltd. v. Norton Lilly & Co., Inc.*, 502 F.2d 1045, 1049 (5th Cir. 1974).

Even where the case is basically documentary and the oral evidence presents no real conflict, the trial court's findings must stand, unless they are, in the words of Rule 52(a)

"clearly erroneous." *Local Union 1219 v. United Bro. of Carpenters & Joiners*, 493 F.2d 93, 96 (1st Cir. 1974). Or, as this Court has stated in a leading decision on the scope of appellate review on damage issues: "If we reverse, it must be because of an abuse of discretion." *Dagnello v. Long Island R.R.*, 289 F.2d 797, 806 (2d Cir. 1961). And it is, of course, equally clear that "... the complaining party has the burden to clearly demonstrate error in the Court's findings." *Snodgrass v. Nelson*, 503 F.2d 94, 96 (8th Cir. 1974).

We have, perhaps, belabored the obvious on Rule 52(a) but only because *nowhere in its brief does Allegheny even refer to that rule*. Yet Allegheny's appeal is basically an attack on the District Court's exercise of its fact-finding responsibilities. This is true of Allegheny's disagreement with the Court's findings on decedent's likely starting salary in Washington, on her prospective salary increases, and on the appropriate discount rate, which includes the treatment of inflation. *See e.g., O'Connor v. United States*, 269 F.2d 578, 585 (2d Cir. 1959).

Thus, in the areas under consideration on appeal here, the District Court had broad, fact-finding discretion, particularly since in determining damages from a wrongful death the trier must necessarily "make an intelligent estimate." *Fairbanks v. State*, 143 Conn. 653, 659, 124 A.2d 893, 899 (1956); *Dagnello v. Long Island Railroad Co.*, 289 F.2d 797, 806 (2d Cir. 1961). Allegheny has simply failed to recognize, much less to scale, the high hurdle erected by Rule 52(a), for the findings which Allegheny challenges are fully supported by the record and well within the District Court's discretion.

I. THE DISTRICT COURT'S FINDINGS ON THE DESTRUCTION OF DECEDENT'S EARNING CAPACITY WERE CONSERVATIVE AND, IN ANY EVENT, CLEARLY WITHIN THE COURT'S DISCRETIONARY FACT-FINDING AUTHORITY

A. Decedent's Starting Salary in Washington

Allegheny disagrees with the District Court's finding that decedent's starting salary for legislative work in Washington—where she and her husband had just started to settle at the time of her death—would be \$15,040 per year (Allegheny Br., pp. 11-14; App. 29a). There is ample support for this finding and by no stretch of the imagination can it be said to be "clearly erroneous."

First, the evidence was unchallenged that decedent, a 1969 graduate from the University of Pennsylvania, was receiving \$10,000 a year when she resigned from Cogen, Holt in New Haven (Feldman, App. 90a; Cogen, App. 133a). That represented an increase of 54% in just 20 months of employment. With Cogen, Holt she had been working on legislative analysis and lobbying, particularly on behalf of the Connecticut Conference of Mayors (CCM) (Cogen, App. 135a-139a; Heimann, App. 174a-175a). The opportunities for similar legislative work were then more plentiful in Washington and the salaries were higher (Cogen, App. 139a-140a). Thus, Mr. Bourke, a contemporary of decedent at Cogen, Holt, moved to Washington in mid-summer of 1971 for legislative work there; he found there were many \$15,500 legislative jobs available for female college graduates, to say nothing of graduates with Mrs. Feldman's ability, character, and almost two years of successful legislative experience (Bourke, App. 160a, 164a-165a, 171a).

Second, it was established that her superiors at Cogen, Holt thought highly of her and would have given her enthusiastic recommendations (Cogen, App. 138a; Feidelson,

App. 153a-154a). The same was true of CCM officials, who had worked closely with decedent in the Connecticut legislative field (Heimann, App. 174a-176a; Feidelson, App. 153a). After all, she had been given increasingly responsible professional assignments and had flown to her death in New Haven only because, although she and her husband had just moved to Washington, she was needed by the CCM for critical lobbying work during the closing days of the Connecticut legislature (Cogen, App. 135a-136a).

Third, the record made clear that while in Connecticut, decedent had informally approached the NLC/USCM for a professional legislative job in Washington and had received an encouraging response (Feldman, App. 98a-99a). The NLC/USCM, which was one of a number of private organizations in Washington with legislative activities, had positions as "legislative counsel" (not requiring a law degree) with salaries beginning at the GS-12 level of \$15,040 (P. Ex. 17-Rodmann Dep., p. 18). The GS-12 job description with the NLC/USCM, with its emphasis on personal contact and working closely with legislators and their staffs, closely matched the actual responsibilities exercised by decedent in her last months with Cogen, Holt (Cogen, App. 135a-136a; Heimann, App. 175a).

Furthermore, Mr. Cogen, by reason of his own work with the NLC/USCM including his position as a member of NLC's Board of Directors, was shown to be thoroughly familiar with its legislative counsel positions. He testified, without challenge, that he considered decedent to be fully qualified for that job at the "lower range" of its salary; that lower range was the \$15,040 found by the District Court (Cogen, App. 138a, 141a). Additionally, decedent was very personable and would have made an excellent impression at a formal job interview (Cogen, App. 136a-137a; Heimann, App. 175a; Bourke, App. 158a, 167a; P. Ex. 17-Rodmann Dep., p. 19).

Fourth, Mr. Bourke's own Washington experience underscores the conservative nature of the Court's finding. When Mr. Bourke went to Washington in the summer of 1971 he received a number of legislative job offers, including one for \$20,000 as legislative counsel for NLC/USCM (Bourke, App. 161a, 172a)—a salary which was \$5,000 more than that which the Court found decedent would have received there. This evidence is significant because Mr. Bourke and the decedent not only had worked together at Cogen, Holt but also had virtually the same age, education, college major, and professional interests and experience (Feldman, App. 89a, 90a, 98a; P. Ex. 10; Bourke, App. 158a-160a). With that near identity of qualifications, since Mr. Bourke did receive and reject a \$20,000 job offer from NLC/USCM for legislative work in the mid-summer of 1971, there is every reason to believe that decedent could have earned at least the \$15,040 projected for her in the same year by the Court for the same type of work (App. 29a-30a).

Allegheny does not begin to match, much less to overcome, the foregoing support for the Court's finding on starting salary by its reference to the deposition of Mrs. Rodmann, the NLC/USCM's personnel director (Allegheny Br., pp. 11-12). Mrs. Rodmann stated that, after reading two resumés relating to decedent and some of her written work, she believed decedent was qualified for a GS-10 grade starting salary at \$11,500 (P. Ex. 17-Rodmann Dep., p. 15). But as the Court pointed out in rejecting this opinion, Mrs. Rodmann had not met or heard of decedent and was not familiar with the subsequent trial testimony of witnesses who had actually worked with her (App. 28a-30a). Furthermore, again as the Court noted, the resumés and written material shown to Mrs. Rodmann emphasized the research aspects of her work and touched only briefly on the personal contact and lobbying work which had characterized decedent's efforts during her last

months at Cogen, Holt and for which, in fact, she had flown to New Haven (Heimann, App. 175a; Cogen, App. 135a-136a). Yet it was this very development of "working relationships" with legislators which was called for in the NLC/USCM's GS-12 job description, and which was not mentioned either for the GS-11 or GS-10 positions, the last-named position being clearly confined to inside research activities and staff support (App. 18a-20a; P. Ex. 17-Rodmann Dep., pp. 16-18).

In sum, the District Court's finding of \$15,040 as decedent's initial earning capacity was amply supported by the evidence. Even if Allegheny's preference for a lower starting figure had equal evidentiary support—which it does not—the Court's finding must be sustained as not "clearly erroneous." *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949); see also, *Dagnello v. Long Island R.R.*, 289 F.2d 797, 806 (2d Cir. 1961).

B. Decedent's Salary Increases and Final Salary Level

The District Court's finding that decedent's likely merit salary increases would have amounted to 3% per year are clearly within the fact-finder's discretionary province (App. 30a-32a; 54a-55a). That discretion is necessarily broad, see *Butler v. Steck*, 146 Conn. 114, 116, 148 A.2d 246, 248 (1959), particularly in the case of an individual whose career was snuffed out well before it reached full flower. See *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 563 (1931); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946). As the Connecticut Supreme Court has stated with respect to wrongful death damages: "No one can place a definite value upon them, nor can one do more than conjecture as to what the future course of any life, if continued, would have been. At best, the trier of facts must take the evidence and make an intelligent estimate." *Fairbanks v. State*, 143 Conn. 653, 659, 124 A.2d 893, 897

(1956). The Court below carried out this mandate with great care.

The District Court used as a guide the Government's July 1971 GS-Table which was in effect at decedent's death; such schedules are and have been followed by the NLC/USCM and comparable Washington organizations with legislative interests. (App. 30a-32a, 54a-55a; P. Ex. 17-Rodmann Dep., pp. 9-12). By utilizing this 1971 table for future years—all the way to 2011—the District Court *prevented any post-1971 inflation from affecting its future income projections for decedent* (see, e.g., App. 31a). Thus, although by the time of trial decedent would actually have received pure cost-of-living increases from NLC/USCM totaling 15% of her starting salary (P. Ex. 17-Rodmann Dep., p. 12), the District Court's calculations excluded all such inflation-caused increases from its calculations. Instead, the District Court's approach credited decedent only with merit increases of about 3% per year, with no credit whatsoever for the regular cost-of-living increases to which NLC/USCM and federal employees have been and are entitled (P. Ex. 17-Rodmann Dep., pp. 9-12); 84 Stat. 1946 (1971), 5 U.S.C. §§ 5301-5305.

We submit that the average 3% annual merit increase found by the Court was modest. Indeed, the projected initial yearly increases were somewhat lower than those projected by Allegheny's expert (App. 31a, n. 20, 54a-55a; Curran, App. 248a). More significantly, the decedent was talented, ambitious, personable and hard working. At 25 she had already carried out professional responsibilities of a high order (Cogen, App. 135a-136a). She had been accepted at George Washington University Law School and had she gone there her earning capacity would have increased (Feldman, App. 97a-98a; App. 27a). As it was, the Court projected that from her start at \$15,040 in 1971, she would progress gradually and steadily, reaching

a peak of \$33,757, equivalent to that of a middle GS-16 level, at retirement at age 65 (App. 54a-55a). It seems more likely that decedent's demonstrated capacity and drive would have propelled her upward at a faster rate to the substantially higher pay levels which were available in Washington. In this connection, it is well to recall Mr. Cogen's testimony that had decedent remained with his firm she would have received annual increases of at least \$1,000, exclusive of additional cost-of-living raises for the indefinite future; together, the two sets of annual increases could have reached \$3,000 per year (Cogen, App. 139a). The Court's finding on salary raises does not accord to decedent any annual increase of \$1,000 or more *at any time during the decedent's entire working life* (App. 54a-55a).

The conservative thrust of the Court's estimate is further emphasized by other facts. First, Mrs. Feidelson, an older colleague of decedent's at Cogen, Holt, had earned \$30,000 in 1973 when she was 26 years out of college (Feidelson, App. 149a, 156a). In contrast, the Court's projection called for the decedent not to receive \$30,000 until she was 37 years out of college (App. 54a-55a).

Mrs. Feidelson had already taken 14 years out to raise her three children, so that she was earning \$30,000 annually after she had spent 12 years in her life's work (App. 156a). In contrast, Mrs. Feldman had planned on an absence of only four to eight years (Feldman, App. 101a-103a); yet, under the Court's calculations she would have had to practice her profession for at least 25 more years before she could attain an annual salary of \$30,000 (App. 54a, 55a).

Second, Mrs. Donald, a Connecticut City Planner and an Allegheny witness on job opportunities for women, was receiving \$22,000 a year at age 39, after 14 years on the job (Donald, App. 238a-239a). Under the Court's projections the decedent would not reach that salary level until

she was 46 and had worked at her Washington job for 14 years (App. 54a-55a). Yet the evidence was clear that job opportunities and salaries in government-related work were greater for women in Washington than in Connecticut (Cogen, App. 139a-140a; Bourke, App. 160a, 164a-165a, 171a).

Third, there is the experience of Mr. Bourke, whose age, qualifications, experience with Cogen, Holt and career aspirations were virtually mirror images of the decedent's (*supra*, pp. 15, 17). Mr. Bourke's first 1971 job in Washington paid \$17,500 (Bourke, App. 161a-162a). By 1974 he was earning \$30,000 a year as an assistant to the Speaker of the House of Representatives (Bourke, App. 162a-163a). In contrast, the District Court's projections called for decedent not to earn \$30,000 until 2006 (App. 54a-55a). In other words, Mr. Bourke, who considered decedent his equal in qualifications for legislative work (Bourke, App. 160a-161a), was actually earning \$30,000 32 years before decedent, according to the Court, would have reached that level.

Allegheny attacks the findings on likely salary raises by claiming that a Government pay regulation refutes Mrs. Rodmann's testimony on the regularity of NLC/USCM merit raises (Allegheny Br., pp. 9-11). But, the charge comes too late. Allegheny never bothered to appear for Mrs. Rodmann's deposition, much less to question her statement on annual merit increases (P. Ex. 17-Rodmann Dep., pp. 1-2, 11-13). Moreover, Allegheny never raised at the District Court level, even in its Motion for a New Trial, the question of alleged conflict between the Government pay regulation which it now cites and the pay scales and annual merit increases referred to by Mrs. Rodmann and the District Court (See P. Ex. 17-Rodmann Dep., pp. 11-13; App. 34a-35a). Hence, Allegheny cannot now raise on appeal such a wholly new argument, for as this Court

recently noted in *Terkildsen v. Waters*, 481 F.2d 201, 204-205 (2d Cir. 1973):

“Adherence to the rule is particularly apt where, as here, factual questions may have been implicated as to which the judge made no findings because the issue was not directly raised and equally, where considerations underlying a subtle legal issue could have been exposed and distilled by the able district judge so as to facilitate more informed consideration by this court.”

Furthermore, even if the question had been properly raised, it would be of no moment because even the cited regulation would not have prevented merit increases averaging 3% per year. In its brief, Allegheny itself concedes, in effect, that the cited pay regulation would permit annual merit increases on the scale found by the District Court, for Allegheny states that “naturally there are exceptions for high-quality . . . performance” (Allegheny Br. p. 10). In short, even under Allegheny’s argument, annual 3% merit increases could be given to decedent under the pay regulation in question. (Federal Personnel Manual, Chapter 531, Subch. 4, Secs. 4-12). Furthermore, there was nothing to prevent the decedent from being promoted from time to time either by the private NLC/USCM, or a comparable private Washington organization, to a higher *grade* with wider responsibilities, and thereby jumping several pay steps in the process (P. Ex. 17—Rodmann Dep., pp. 12-13). After all, the ability to handle expanded responsibilities had been part and parcel of her record at Cogen, Holt and had undoubtedly accounted for her 54% salary increase in less than two years (Cogen, App. 135a-136a).

Finally, it must be remembered that the District Court cannot be held to the determination of indisputably correct sums with respect to future earnings. See *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 559 (1931) (“The wrongdoer is not entitled to complain that they [damages]

cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise"). See also *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946). Such an undertaking, as the Connecticut Courts have recognized, would be an impossibility. It is enough for the Court below to have made an "intelligent estimate." *Fairbanks v. State*, 143 Conn. 653, 659, 124 A.2d 893, 898 (1956). In point of fact, the Court far exceeded that standard in terms of care and specific evidentiary support.

C. Projected Earning Capacity During Decedent's Child-Rearing Years

The Court found that at the age of 30 decedent would interrupt her regular full-time work for eight years to raise the two children she and her husband were planning to have, that during this period she would have remained in sufficient contact with her field, perhaps through part-time work, to maintain her earning capacity and that thereafter she would resume full-time work in her chosen field (App. 32a-33a).

Allegheny objects to the Court's holding that decedent's death destroyed her earning capacity of \$17,044 per year during that eight-year period (Allegheny Br., pp. 14-16). Allegheny's contention appears to be that in a wrongful death case which happens to involve a married woman, the decedent's estate should not be credited with any money the decedent was capable of earning during any period she was planning to take time out to raise children. The Court's holding to the contrary is both appropriate and required by Connecticut law.

A critical element in Connecticut's treatment of future earnings in death cases is its repeated emphasis on the loss of earning capacity. Thus, *Floyd v. Fruit Industries, Inc.*, 144 Conn. 659, 669-670, 671, 136 A.2d 918, 924, 925-926 (1957) specifically includes among wrongful death damages those

attributable to the “*capacity to earn money*” and the “destruction of earning *capacity*.” (Emphasis added.) Similarly, the trier of facts must inquire “into the value of the person’s *capacity* to earn money by his labor, physical or intellectual.” *Davis v. P. Gambardella & Son Cheese Corporation*, 147 Conn. 365, 370, 161 A.2d 583, 586 (1960) (Emphasis added.) To put it another way, the Court must appraise the decedent’s “net earning power.” *McKirdy v. Cascio*, 142 Conn. 80, 86, 111 A.2d 555, 558 (1955). (Emphasis added.) See also, *Chase v. Fitzgerald*, 132 Conn. 461, 467, 45 A.2d 789, 792 (1946) (“destruction of earning capacity”); *Jackiewicz v. United Illuminating Co.*, 106 Conn. 310, 312, 138 A. 151, 153 (1927) (“diminution of the minor’s earning capacity”). Connecticut thus follows the prevailing rule in this country that “[T]he Court may properly instruct the jury that they may consider impairment of plaintiff’s ‘capacity to earn money’, although there is no evidence of loss of actual earnings.” 25A C.J.S. § 185.6, pp. 231-32.

Accordingly, the Court below correctly noted that in a wrongful death case, compensation must be based on the “loss of earning *capacity*, not future earnings, per se.” (App. 25a.) There can be no question that until her retirement date, the decedent would have retained the capacity to work full-time. She was experienced, energetic and wanted and enjoyed a professional career (Feldman, App. 95a-97a, 102a, 118a; Feidelson, App. 152a-153a). The fact that at the time of her death she was planning to take some time off at a future date to start raising children in no way affected that innate capacity to earn, which she had retained right up to the time of her death. Thus, under Connecticut law her estate must be reimbursed for the lost *capacity* to earn money regardless of whether she actually would have exercised that capacity fully during the period in question. After all, at the time of her death, she had the option of changing her mind about having children.

Similarly, assuming that decedent had the two children, there was nothing to prevent her from reducing drastically the period away from full-time work. Indeed, Allegheny's own witness had two children and took only two years off from her full time professional work without any apparent ill effects on her career or family (Donald, App. 239a).

In sum, during the prospective eight-year period what was destroyed, *inter alia*, by her death was Mrs. Feldman's capacity to earn money. As such, that particular loss of earning capacity must be compensated, whether she would have chosen to exercise that capacity or not during the period. Allegheny's different view is at odds with Connecticut's continuing stress on the loss of a decedent's *capacity* to earn and with the freedom of this decedent to change her mind both about having children and about the amount of time she wished to devote primarily to their rearing. It would also unjustifiably relegate married women in wrongful death cases to a status inferior to that of men, a relegation which finds no support in the Connecticut cases.

Here, as elsewhere, the Court proceeded conservatively in its actual findings. For one thing it froze the decedent's prospective pay at \$17,040 throughout the child-rearing period without any salary increases. The underlying assumption that decedent's professional competence would not have improved at all during that period, thereby increasing her earning power, is inconsistent with the vigorous pursuit of her career (see also, Feldman, App. 98a, 101a-102a, 108a, 129a). The Court also found that this child-rearing, no-raise period would last eight years (App. 32a). Mr. Feldman had testified that his wife had planned to take off from four to eight years from her full-time career (Feldman, App. 101a-103a). The Court could have selected a figure within that range, but instead by picking eight years, selected the upper end of the range, thereby

reducing somewhat the ultimate recovery to the decedent's estate.

Allegheny's proposed shift of damages during the eight year child-rearing period from the loss-of-earning category to the loss-of-enjoyment category makes no sense (Allegheny Br., p. 16). Furthermore, there is nothing in this case or in the *Fairbanks* or other Connecticut decisions which would suggest that such a shift—prohibited, as we see it, by Connecticut law—would result in a diminution of the ultimate recovery (*infra*, p. 46). Indeed, the statutory requirement that wrongful death damages be “just” would preclude any such baseless reduction.

In a sentence, the District Court was correct in its ruling on the loss of earning capacity during decedent's planned period of child-rearing concentration and conservative in its findings as to how much that loss was worth.

II. THE DISTRICT COURT'S FINDING OF A 1.5% DISCOUNT RATE CONSTITUTED A PROPER EXERCISE OF ITS FACT-FINDING RESPONSIBILITIES

Allegheny attacks the District Court's finding of a 1.5% discount rate as being contrary to law (Allegheny Br., pp. 3-9). Yet the selection of a discount rate presents a factual question, as recognized explicitly by this Court in *O'Connor v. United States*, 269 F.2d 578, 585 (2d Cir. 1959). In its brief *Allegheny does not contend that the lower court's 1.5% rate is not supported by the evidence*. And, indeed, the rate found by the District Court has ample support in the record and is, in any event, far from “clearly erroneous.”

It may be helpful to summarize, at the outset, the principal points which dispose of Allegheny's claim. First, the Connecticut decisions, which are controlling under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), do not fix the discount rate at any particular percentage and do not preclude consideration of inflation in determining that rate.

Instead, like the Second Circuit, they leave this question, as one of many inter-related factual issues affecting the extent of recovery in wrongful death cases, to the sound discretion of the trier of facts. This is consistent with Connecticut's statutory language which calls simply for the award of "just damages" in such cases. Conn. Gen. Stats. § 52-555.

Second, the 1.5% rate, so meticulously determined by the District Court, was justified by the evidence concerning the decedent. Since, in its computation of decedent's loss of future earning capacity, the Court had excluded all inflationary effects, it was only proper for the Court, in its computation of the true yield on safe investments, similarly to exclude all inflationary effects. This might well not be appropriate for all decedents at all times, but it certainly was proper for the decedent here. Had she lived, she would have received the 15% cost-of-living increases awarded to NLC/USCM employees from July, 1971 until April, 1974 and would have continued to receive cost-of-living increases thereafter on a regular and substantial basis, including one of over 5% that became effective in October, 1974 (See *e.g.*, Appendix C hereto). Yet in its calculations, the Court credited decedent with no such inflation-caused increases but instead assigned her only the wholly separate and modest merit increases of about 3% per year (App. 30a-33a, 54a-55a).

Third, the propriety of the Court's 1.5% finding is further supported by certain features of this case and their disposition by the Court. Between the accident and the trial the value of the dollar had eroded by 18.7%. By the end of 1974 the erosion of the dollar had increased to 27.8% (Appendix A hereto). Furthermore, the rate of inflation continues to outpace the rate of safe investment, to say nothing of post-judgment interest (*Ibid.*). Expert testimony for the plaintiff indicated that the real, average inflation-free yield on safe investments over 18 years had

been 1.27%, which the expert had rounded up to 1.5% (Malasky, App. 194a-196a). The Court's own thorough analysis of investment rates and cost-of-living increases over a 34 year period supported selection of the same 1.5% figure (App. 81a-89a).

In addition, any conceivable elevation in the recovery attributable to a 1.5% discount rate is offset by other countervailing and conservative findings which depressed that recovery, including the following: application of a high 25% income tax to all of decedent's earnings; the refusal to make an award for pain and suffering even though the decedent died of burns and asphyxiation; the Court's selection of the longest possible no-raise period for decedent's child-rearing years; the absence of any award for pre-judgment interest; the unusual 3% annual increase in deductible necessary living expenses during all of decedent's working years; the continued post-retirement deduction of living expenses even though the Court declined to allow decedent any full-time, part-time or pension payments in that period.

Fourth, prior to the trial below the 1.5% discount rate had received significant support from this Court in the *Perry* case involving the same crash in Connecticut. In that case, in his charge to the jury, Judge Blumenfeld had referred both to the 1.5% discount rate urged by the expert for that plaintiff and to that expert's rationale in reaching that figure—a rationale which approximates the approach taken by the District Court in this case (Second Circuit Doc. No. 73-1791: Charge to Jury, p. 13). On appeal Allegheny attacked all references by the District Court to the expert's testimony in its charge (Second Circuit Doc. No. 73-1791: Allegheny Brief, p. 22; see also *Perry* Brief, p. 3); yet, this Court upheld the charge, albeit only in general terms. *Perry v. Allegheny Airlines, Inc.*, 489 F.2d 1349, 1353 (2d Cir. 1974).

A. Connecticut Treats the Discount Rate as an Issue of Fact and Accords Broad Flexibility Thereon to the Trial Court

Connecticut leaves to the trier of facts broad discretion in the selection of an appropriate discount rate whereby the loss of future earning capacity is reduced to a present value. This is in keeping with the principle enunciated in *O'Connor v. United States*, 269 F.2d 578, 585 (2d Cir. 1959) where this Court stated: "[T]he rate is to be determined by the trier."

There is, as Allegheny admits, no Connecticut decision which purports to assert a particular percentage or percentages as required or even appropriate (Allegheny Br., p. 4). Nor is there any Connecticut case which holds or suggests that a particular discount rate is too high or too low as a matter of general principle. On the contrary, that state's Supreme Court has treated such rates as merely one of a number of factual elements in tort damage cases to be resolved with broad discretion at the trial level. This approach was taken in *Jackiewicz v. United Illuminating Co.*, 103 Conn. 310, 312, 138 A. 151, 153 (1927), where the Connecticut Supreme Court held that the trial court should reach its award after determining the loss of earning capacity "and then ascertaining the sum which would represent the present worth of the ascertained loss from the diminution of earning capacity." It is significant that the Supreme Court set forth no percentage figure and no range of figures and prescribed no specific factors which should guide a jury in the discounting role assigned to it. Indeed, we know of no Connecticut decision which has reversed a trial court judgment on the ground that the discount rate was too low or too high.

Chase v. Fitzgerald, 132 Conn. 461, 45 A.2d 789 (1946) similarly accords a wide berth to the trial court on discount rates. There, the Supreme Court repeated the discounting requirement in broad terms. Citing *Jackiewicz*,

the Court held that the trier of fact must consider "... as regards any loss due to the destruction of earning capacity the fact that a present cash payment will be made instead of the sums which, had he lived, would have been received by him at periodic intervals in the future." (*Id.* at 792.)

The latitude thus accorded to the trial court for discount rates finds a counterpart in *Floyd v. Fruit Industries, Inc.*, 144 Conn. 659, 668, 136 A.2d 918, 927 (1957), where the Supreme Court disregarded certain errors in the trial court's charges concerning deductions for living expenses in substantial part "because of the impossibility of making any exact mathematical computation of either of the elements under discussion, to say nothing of making an exact computation of other elements entering into the calculation of damages for wrongful death" The selection in Connecticut of an appropriate discounting rate is, then, but one factual part of the larger loss-of-earning capacity area, which is also an area of fact and where "[T]he solution of the problem is left to the trier's good judgment." *Lane v. United Electric Light & Water Co.*, 90 Conn. 35, 36, 96 A. 155, 156 (1915). See also, *Waldron v. Raccio*, Conn. L.J., July 9, 1974, pp. 6, 8 (Conn. Supreme Ct.).

B. The Court's Finding of a 1.5% Discount Rate Properly Reflected the Particular Facts of This Case

In finding that a 1.5% discount rate was proper, the District Court subtracted the historic inflation rates from the historic rates on safe United States Government securities (App. 47a). This was the basic approach taken by plaintiff's expert who had calculated an average investment rate in mutual savings banks over an 18-year period at 4.14% and the inflation rate (consumer price index) over the same period at 2.8%; he thus came up with a true yield of 1.27% which, in the interest of conservatism, he had rounded up to 1.5% (Malasky, App. 191a, 194a-196a; App. 46a). The

District Court conducted an exhaustive analysis of its own in a 9-page Appendix, subtracting, over a 34-year period, the official Government cost-of-living indices from various investment rates on government securities and found that the 1.5% figure was the correct approximate measurement of the difference and reflected the actual yield on such safe investments ⁴ (App. 71a-79a; 47a-49a).

Allegheny does not question the accuracy of the basic data or the District Court's calculations thereon. Instead, it simply criticizes any deductions from the rates on safe investments on the ground that the Court's deductions of cost-of-living rates give unlawful recognition to inflation in the assessment of damages (Allegheny Br., pp. 3-9). This criticism is misplaced.

In the first place, in making this argument, Allegheny ignores the evidence concerning decedent's future earning capacity as it applies to the cost-of-living issue. This was the same kind of error into which Allegheny's expert fell at trial when he projected decedent's prospective earning power without listening to or reading any of the testimony from a variety of sources about her background, character and record (Curran, App. 260a-261a, 266a-267a). Yet it is this individual capacity with which the trial court necessarily had to concern itself in projecting decedent's future

⁴ When the consumer price index for each year from 1940 through 1973 was deducted from the gross yield on three month Treasury bills for those same years, the average true yield on those bills was shown to vary between 0.4% and 1.1% (Table A-1, App. 75a). During a shorter period, the relatively low inflationary period of 1952-1967, the average yield on the same bills was between 1.8% and 2.0% (Table A-2, App. 76a). The same process revealed an average yield between 1940 and 1974 on 10 to 15 year Federal Bonds of between 0.7% and 1.5% (Table A-III, App. 77a). For three to five year Federal Notes the average yield in that same 34 years varied from 0.5% to 1.8% (Table A-IV, App. 78a). The District Court's independent 34-year analysis thus established the propriety of a 1.5% discount rate in this case, particularly since the Court's reliance on the particular federal securities entailed a generally higher rate of interest than on other safe investment instruments (App. 47a).

earning capacity. See *Fairbanks v. State*, 143 Conn. 653, 661, 124 A.2d 893, 898 (1956) ("... no one life is like any other").

The evidence on decedent's prospects is specific and compelling. It is sufficient to repeat here that her record and talents render conservative the Court's finding of 3% annual merit increases (*supra*, pp. 19-21). More important for the discount rate, she would have received from NLC/USCM the regular cost-of-living types of increases which that organization grants to all employees in tandem with the statutorily-mandated increases granted by the Government to its civil servants. 84 Stat. 1946 (1971), 5 U.S.C. §§ 5301-5305.

Thus, in the 33 month period between July 1, 1971 (decedent's assumed starting date in Washington) and the trial NLC/USCM, like the Government, had given all its employees several cost-of-living increases, amounting to about 15% in all, or an average of over 5% per year (P. Ex. 17-Rodmann Dep., pp. 9, 10, 12). These inflation-caused increases, which are wholly separate from merit increases, are likely to continue indefinitely, tied as they are to similar increases for the Government civil servants (*Ibid*). One such increase, in fact, did take place in October, 1974; as shown in the attached Appendix C, it came to about 5.3% over the previous scale. Thus, from July 1, 1971 to date, decedent would have received cost-of-living increases of over 20%. Assuming only the merit raises projected by the Court, decedent would today be receiving a salary of \$16,543, the equivalent of a grade GS-12, step 4 (Appendix B hereto). But in fact with the added cost-of-living increases accorded to Government and NLC/USCM employees since July, 1971, she would really be earning \$20,308 today, an actual increase of 23% over the Court's projections (Appendix C hereto). Yet, the Court projected that decedent would not be receiving that salary of \$20,308

until 1992, which is 18 years after she would have actually reached that level and which would cover 45% of her working life (App. 54a-55a).

Thus, there was nothing speculative about how decedent would fare under inflation. This element distinguishes the case from those in other jurisdictions which have shied away from considering inflation because of a belief that its possible effect on the individual was too uncertain. Decedent here was not one of those individuals with a reasonable chance of being left behind by inflation and of receiving few, if any, cost-of-living increases over the years. On the contrary, she was embarking on one of those professions having considerable built-in protection against inflation.

Under these circumstances and since the Court had excluded all inflation-caused raises from its projections of decedent's future earning prospects, it was essential that the discount rate be reduced correspondingly. This is not to say that such a deduction of the historic inflationary rate from an historic safe investment rate would necessarily be appropriate for other decedents in other periods. On the contrary, there is no single formulation and no sure-fire discount rate which can be properly applied across the board. We do say, however, that the District Court's approach was appropriate here, given the record and future prospects of the decedent and the inflationary trends. If "just damages" are to be awarded, as required by the Connecticut statute, surely the District Court was entitled to look at the effect of dollar erosion on the value of an appropriate award. *See, e.g., In re Sincere Navigation Corp.*, 329 F.Supp. 652, 660 (E.D. La. 1971) ("I have assumed a discount rate of 5% and a three percent inflationary level thus making the net discount rate 2%."); *Curry v. United States*, 338 F.Supp. 1219, 1224 (N.D. Calif. 1971) (linkage of inflation and discount rates); *Beaulieu v.*

Elliott, 434 P.2d 665, 671 (Alaska 1967) (no discounting permitted because of inflation).

Mrs. Feldman died in June 1971. Between that time and the April 1974 trial date, the official Consumer Price Index, the best indication of inflation according to the parties and the District Court, had risen from 121.5 to 143.9 as shown in the Appendix A attached hereto. This amounts to a reduction of 18.7% in the value of the dollar (see also App. 47a). By the time of the judgment below, in August, 1974, the dollar depreciation had reached 23% (Appendix A hereto). And throughout this period the Court did not award any pre-judgment interest as a partial offset for that erosion (App. 49a-50a). By December, 1974 the CPI had risen to 155.4; this meant a 27.8% depreciation in the dollar since decedent's death (Appendix A-1 hereto). Furthermore, as shown in Appendix A-1, inflation is continuing at a rate in excess of the 6% rate for post-judgment interest (see App. 47a).

A second element which is significant on review lies in the detachment, detail and precision with which the experienced District Judge made his analysis. See, *Fuchstadt v. United States*, 434 F.2d 367, 370 (2d Cir. 1970); 5A *Moore, Federal Practice* § 52.03(1), p. 2627 (1974). The Court based its study not on current statistics but rather on reliable, official Government data stretching back over 34 years; it also used Treasury securities with relatively high interest rates (App. 47a, 71a-79a). This, in turn, gave reasonable assurance of a balanced derivation of a true discount rate which could be expected to apply over the period of decedent's prospective working years. Thus, the average yearly inflation rate utilized by the Court in its 34 year calculations was about one-third or one-fourth of the current inflation rate (App. 71a-79a; Appendix A hereto). In any event, the selection of the 1.5% rate was certainly a permissible exercise of the District Court's fact-

finding discretion. See *United States v. Yellow Cab. Co.*, 338 U.S. 338, 341-342 (1949); *Local Union 1219 v. United Bro. of Carpenters and Joiners*, 493 F.2d 93, 96 (1st Cir. 1974) (Rule 52(a) applies even if the evidence is documentary and the oral testimony is not in dispute).

For these same reasons Allegheny is mistaken in its contention that Connecticut prohibits its courts from taking inflation into account in a wrongful death case of this kind. Indeed, it can point to no Connecticut decision which holds that inflation must be ignored. Even the 1957 *Quednau* decision, which is cited by Allegheny and which was decided in a period of relatively stable prices, did not preclude the consideration of inflation under any circumstances (Allegheny Br. pp. 5-7). The opinion specifically disclaimed any such sweeping rule; rather, it held simply that the evidence in that case did not justify a charge to the jury on inflation. *Quednau v. Langrish*, 144 Conn. 706, 714, 137 A.2d 544, 549 (1957); see also, *Cooley v. Crispino*, 21 Conn. Supp. 150, 147 A.2d 497 (Conn. Superior Ct. 1958). Moreover, an examination of the record certified to the Connecticut Supreme Court in the *Quednau* case establishes the absence of any evidence at trial on the subject either of inflation or of cost-of-living increases for the individual in question.

Darling v. Burrone Bros., Inc., 162 Conn. 187, 200-201, 292 A.2d 912, 920 (1972) is also not in point (Allegheny Br., pp. 7-8). There, the Connecticut Supreme Court merely upheld the refusal of the trial judge to upset a jury verdict as excessive. It made no statement on inflation and there is nothing in the record certified to the Supreme Court to indicate that any evidence had been presented on the subject or that any jury charge had been requested on it. The opinion's language quoted by Allegheny was an obvious effort by the Supreme Court to show the appropriateness of the jury verdict by demonstrating its reasonableness even

under conservative assumptions. Indeed, the Court's use of the words "... *even if* the future loss were reduced to present worth . . ." (emphasis added) could suggest that discounting may not always be required in Connecticut.

The Second Circuit cases cited by Allegheny are equally inapplicable. *Alexander v. Nash-Kelvinator Corp.*, 271 F.2d 524 (2d Cir. 1959) did not undercut the rule stated in *O'Connor* that discounting is a matter for the trier of fact. In *Alexander* this Court made an express exception to what it described as a "well settled rule" of trial court discretion on damages simply because of the highly unorthodox recalcitrance of the District Court there in failing to comply with the Court of Appeals' prior mandate. The District Court had previously been reversed for lack of specificity in its damage findings, 261 F.2d 187 (1958), and, on remand, it had still declined to provide specific findings on the damage issues. 271 F.2d at 527. This Court thus was compelled to reverse again, stating as follows about the District Court's cavalier approach to the discount rate issue: "No reason is stated for using a 2½% rate." (*Id.*).

The opposite is true here. The District Court's 19 pages of closely-reasoned explanation and 9 pages of supporting calculations probably constitute the most detailed and clear-cut exposition of the discount rate issue ever undertaken by any District Court (App. 36a-55a, 71a-79a). And in *Rapisardi v. United Fruit Company*, 441 F.2d 1308 (2d Cir. 1971) this Court did not discuss the propriety of a particular discount rate level. It merely disapproved of the method of applying that rate, an issue which is not present here (*Id.* at 1313).

Furthermore, as the District Court pointed out below, the general common law supports consideration of inflation in appropriate circumstances (App. 39a-41a). "The

rule is now well settled that a court, in determining whether an award of damages for personal injuries is proper, can consider changes in the cost of living, or in its alternative expression, in the purchasing power of money." 22 Am. Jur. 2d 887, p. 125. *See also, e.g., Texas Consolidated Transportation Co. v. Eubanks*, 340 S.W.2d 830, 837 (Tex. Civ. App. 1960); *Clifford v. McCloskey*, 13 N.J. Super. 96, 80 A.2d 134 (1951); *In re Sincere Navigation Corp.*, 329 F. Supp. 652, 660 (E.D. La. 1971); *Scruggs v. Chesapeake and Ohio Railway Co.*, 320 F. Supp. 1248, 1251 (W.D. Va. 1970); 25A C.J.S. § 100, p. 901; 6 U. San Francisco L. Rev. 311, 324 (1972). "Any court which refuses to consider evidence of future inflation is ignoring economic reality. Truly complete compensation for loss of future earnings must take into account changes in the cost of living."

This view is rooted in the common sense principle that tort damages seek to compensate for the *value* of what has been lost or destroyed. The rationale is well stated in *Hurst v. Chicago B. & Q. R.R.*, 280 Mo. 566, 219 S.W. 566, 568 (1920) where the Missouri Supreme Court stated:

"Compensation means compensation in value. It will not do to say that the same amount of money affords the same compensation when money is cheap as when money is dear. The value of money lies not in what it is, but in what it will buy." *See also Halloran v. New England Telephone & Telegraph Co.*, 95 Vt. 273, 274, 115 A. 143, 144 (1921) and cases and authorities cited in the decision below at App. 39a-41a.

**C. The 1.5% Discount Rate Is Also Supported by the Court's
Conservative Resolution of Other Factors Affecting the
Level of Recovery**

In the preceding section we have stressed that the Court's subtraction of the historic inflationary rate from the historic safe investment rate was justified by the expert testimony, the Court's exclusion of decedent's future cost-of-living increases and the inflationary trends. But the

Court's finding of a 1.5% discount rate is also supported by a number of other damage elements, which, in their accumulated form here, make the reasonableness of the Court's finding unassailable.

The discount rate is, after all, only one of a number of factors which affect the level of recovery in a wrongful death case. It, therefore, cannot and should not be considered in isolation, separate from other findings of the Court which affect the amount of the award. The inter-relationship of such factors, including not only inflation but income taxes as well, has been recognized by this Court in several cases and has led the Court to consider the validity of certain items bearing on damages by reference to other aspects of the same award. Thus, in *McWeeney v. New York, N.H. & H.R.R.*, 282 F.2d 34 (2d Cir. 1960) and *Petition of Marina Mercante Nicaraguense*, 364 F.2d 118 (2d Cir. 1966), in declining to permit deductions for income taxes, this Court considered the depressing effect that factors such as inflation and attorney fees had on the true level of tort recoveries. So here, the propriety of the District Court's 1.5% discount rate should be considered not only in the light of the strong evidence which supports it, but also in the light of other pertinent aspects of the decision below, which tended to reduce the amount of the award. Viewed in this context, the case for the 1.5% rate becomes even more compelling.

First, no pre-judgment interest was awarded (App. 49a-51a) even though between the 1971 accident and the 1974 judgment the value of the dollar had declined by 23% (*supra*, p. 34). Pre-judgment interest has been frequently awarded for periods which were far less inflationary. *E.g.*, *Petition of Marina Mercante Nicaraguense*, 248 F.Supp. 15, 36 (S.D.N.Y. 1965); *Petition of Marine Sulphur Transport Corp.* (S.D.N.Y.) July 31, 1974 (Doc. No. 63 AD 237) (Slip Op., p. 4) (compound interest for 11 years).

Second, the tax rate of 25% selected by the Court was on the high side (App. 35a). Most jurisdictions allow no deductions for income taxes. *Boston & M. R.R. v. Talbert*, 360 F.2d 286, 291 (1st Cir. 1966); *Culley v. Pennsylvania R.R.*, 244 F. Supp. 710, 715 (D. Del. 1965); *Texas Consolidated Transportation Co. v. Eubanks*, 340 S.W.2d 831, 836 (Tex. Civ. App. 1960); *Shanks v. United States*, M.D.La. Civ. 72-293, December 18, 1974 (Slip Op., p. 14). Moreover, the 25% rate was applied here to all prospective salary levels in contrast to the Second Circuit rule, in federal cases and in cases where applicable state law is silent, which bars income taxes on salaries below a certain level, that level being left to the discretion of the trial court. *LeRoy v. Sabena Belgian World Airways, Inc.*, 344 F.2d 266, 276 (15% tax rate applied); *McWeeney v. New York, N.H. & H. R.R.*, 282 F.2d 34, 35-39 (2d Cir. 1960). And the District Court's 25% rate here contrasts with the *Marine Sulphur Transport* case, where the District Court imposed no taxes on incomes under \$25,000 (Slip Op., p. 5).

Third, the District Court declined to grant any damages for pain and suffering even though it found correctly that the plane had not exploded on impact, that some persons were conscious after the crash, that the explosion occurred about two minutes thereafter following flames which had started on the right side of the plane, that the decedent had died of second and third degree burns and smoke asphyxiation, that the autopsy further showed she had suffered no broken bones and that her vital organs showed no abnormalities (App. 57a-60a; Kelly, App. 84a).

The Court recognized that the foregoing evidence of plaintiff, from the official Accident Report, a survivor (one of three), the autopsy and death certificate, would support a finding of conscious pain and suffering but declined to grant any such damages as being too speculative (App.

59a-60a). In our view the plaintiff's uncontroverted evidence, which was accepted by the Court, shifted the burden of proof on pain and suffering to Allegheny and since Allegheny presented no evidence on the subject, damages should have been awarded on this point. *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946). ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."); *Story Parchment Co. v. Paterson*, 282 U.S. 555, 563 (1931).

Fourth, as shown in Appendix A and A-1, the rate of post-judgment inflation exceeds the allowable post-judgment interest of 6%. Indeed, the inflation rate has exceeded the rate on safe government securities (see App. 47a, n. 31).

Fifth, the District Court took the unusual step of increasing the decedent's necessary living expenses by 3% annually, from \$2,750 up to \$6,000 per year at retirement (App. 64a, 67a). Cf. *Petition of Marine Sulphur Transport*, (S.D.N.Y.) July 31, 1974 (Doc. No. 63 AD 237). (Slip Op., p. 4). The Court imposed this increase in deductions even though it excluded from its future earning projections all cost-of-living increases.

Sixth, the Court continued to deduct living expenses of \$5,000 per year in decedent's post-retirement years even though it credited her with no income during this period (App. 65a-68a). This was contrary to the position taken by both of the parties' experts (App. 65a).

Seventh, Mr. Feldman had testified that his wife planned to be absent from her work for four to eight years; yet, the Court selected the eight year figure rather than any figure in between (Feldman, App. 101a-102a; App. 32a). Furthermore, even though at the time of her death decedent retained the options of reducing her intended absence from full-time work or of improving her professional ca-

capacity by study, and even though the measure of damages is the destruction of earning capacity, the Court nevertheless denied any salary raises whatever during this eight-year period (App. 33a, 54a).

Finally, and at the risk of repetition, the 3% average annual merit increases projected for decedent are low, given the decedent's accomplishments, character and ambition. Her record suggests faster and larger merit increases (*see, supra*, pp. 19-21).

The foregoing distinguish in one way or another the New York cases on which Allegheny relies in opposing the District Court's findings on discount rates here in a Connecticut case. In *Petition of Marina Mercante Nicaraguense*, 248 F.Supp. 15 (S.D.N.Y. 1965), Judge Weinfeld applied a 4% discount rate, but he also permitted pre-judgment interest and applied an 11% income tax rate which this Court of Appeals reversed as excessive, mentioning the mild inflation then in effect as an element in its decision. 364 F.2d 118 (2d Cir. 1966). The District Court there projected no continued salary increases but, unlike the situation here, there was nothing to indicate that decedents were likely to receive merit or cost-of-living wage increases. Similarly, in *LeRoy v. Sabena Belgian World Airways*, 344 F.2d 266 (2d Cir. 1965), a 4% discount rate case, income taxes of only 15% were deducted on all income, which extended up to \$25,000, and in addition there was no indication of the exclusion, as here, of the effect of inflation on future earnings. Significantly, too, these decisions were rendered a decade ago when the economy was far more stable and inflation existed only to a very limited extent and it was, therefore, reasonable to assume that a higher discount rate was also virtually inflation-free.

Allegheny's citation of the more recent *Petition of Marine Sulphur Transport*, (S.D.N.Y.) July 31, 1974 (Doc. No. 63 AD 237) is curious because the approach taken in

that case would produce a higher recovery here than was allowed by the District Court. There, the Court applied a 6% discount rate, but it did so only after awarding 6% pre-judgment compound interest for 11 years. It also projected a 6% annual wage increase which the Court based in part on "prevailing inflation", kept deductible living expenses at a stable, non-changing level, and imposed no income taxes on salaries under \$25,000 and only 20% in taxes on salaries over that level.

In contrast, here, the Court allowed no pre-judgment interest, projected a 3% annual merit increase which specifically excluded inflation-caused raises, imposed a flat 25% income tax on all salaries across-the-board, and increased deductible living expenses by 3% per year, from \$2,750 to \$6,750 at the time of retirement. Furthermore, at the time of the 1963 accident in *Marine Sulphur Transport*, the inflationary trends were far weaker than they were at the time of Mrs. Feldman's death in 1971.

D. In the *Perry* case, Involving the Same Airplane Crash, the Second Circuit Gave Significant Support to the Present Use in Connecticut of a 1.5% Discount Rate

In *Perry v. Allegheny Airlines, Inc.*, 489 F.2d 1349 (2d Cir. 1974), this Court had before it a jury verdict awarding \$369,400 to the estate of a 38 year old man who was killed in the same Allegheny crash. The trial had been held in the same lower court as here; the same District Judge had presided.

Allegheny's appeal attacked the verdict as excessive and challenged both the testimony of Perry's economic expert and Judge Blumenfeld's charge (Doc. No. 73-1791: Allegheny Brief, pp. 1, 12, 15, 22-23). Allegheny objected particularly to the Judge's "... continuously referring the jury to his [the plaintiff's economic expert's] testimony" in his charge to the jury (*Id.*, p. 22).

In his *Perry* testimony, that economic expert, a Dr. Martin, had utilized a 1.5% discount rate. He had reached that figure by subtracting a historic inflation rate from a historic safe investment rate (Doc. No. 73-1791: Charge to Jury, p. 13), which was basically the same approach taken in the instant case by the plaintiff's expert and adopted by the Court. In his charge to the *Perry* jury, Judge Blumenfeld did not, of course, direct the jurors to apply the 1.5% rate, but rather instructed them to make up their own minds. But at the same time the charge clearly did not rule out use by the jury of the 1.5% figure if they so desired. The Judge charged, in one of a few specific references to Dr. Martin's testimony:

"I think Dr. Martin took five percent for that figure, the discount rate. There was testimony that we can get that in the banks. There was testimony that U.S. Government bonds yield more than five percent. There was testimony that good utility bonds would yield up to, I think, seven percent. I'm not sure. There were some that would yield six, some that would yield seven.

"But what was an appropriate interest rate to apply? That is for you to determine. And when you do, then you must discount according to that rate.

"The element of inflation was added in here and what Dr. Martin did was to balance off the rate of inflation. He took a rate of inflation, I think, of 3½ percent, a discount rate of 5 percent, and therefore applied a rate of 1½ percent as his discount." (Docket No. 73-1791: Charge to Jury, p. 13) (Emphasis added).

We recognize that in *Perry* this Court did not deal specifically with the discount rate issue or even with the propriety of this particular part of the District Court's charge. But at the same time in upholding the Judge's charge, this Court was aware of the following: that plaintiff's Dr. Martin had utilized "certain assumptions of inflation and interest", 489 F.2d at 1351; that on appeal Allegheny was

objecting not only to Dr. Martin's testimony but also to Judge Blumenfeld's reference to that testimony in his charge; that the charge had referred specifically to Dr. Martin's advocacy of a 1.5% discount rate based on the difference between the safe investment rate and the inflation rate; and that the charge had the effect of permitting the jury to adopt that approach and apply that percentage in reducing the loss of Mr. Perry's future earnings to a present value (Docket No. 73-1791: Charge to Jury, p. 13). In addition, this Court knew that Mr. Perry was only one of a number of persons killed in the Allegheny crash and presumably was aware that other wrongful death cases, arising out of the same accident, were pending in the same District Court. Under such circumstances, we believe that this Court's affirmance of the *Perry* charge supports the lower court's finding that a 1.5% discount rate was proper here.

Furthermore, both parties to the *Perry* appeal had made known to this Court their differing views as to the proper way of handling the inflation issue at the trial level (Doc. No. 73-1791: Allegheny Brief, p. 15; Perry Brief, pp. 3, 11). Indeed, Allegheny was particularly concerned there about the possible double injection of inflation factors into the calculations of future earnings stating in its brief that "Deducting the inflation rate would be improper *if inflation was included in the earning projections*" (Doc. No. 73-1791: Allegheny Brief, p. 15) (Emphasis added). From this statement, one could infer that Allegheny did not object to "deducting the inflation rate" in arriving at the discount rate if, in fact, inflation had been excluded in the earnings projections. That, of course, is exactly what the District Court here did below; it carefully excluded all cost-of-living increases from its calculations of decedent's future earnings even though decedent was reasonably assured of such increases on a regular and substantial basis.

III. THE DISTRICT COURT'S AWARD OF DAMAGES WAS CLEARLY NOT EXCESSIVE

As this Court has held in *Dagnello v. Long Island R.R.*, 289 F.2d 797, 806 (2d Cir. 1961), "If the question of excessiveness is close or in balance, we must affirm." See also, *Perry v. Allegheny Airlines, Inc.*, 489 F.2d 1349, 1353 (2d Cir. 1974). Allegheny has not shown that the award of \$444,056 presented a close question much less that it involved an abuse of discretion (Allegheny Br., pp. 16-19). Certainly it cannot be said that the size of the judgment below so "offends a sense of justice" as to call for reversal. *Waldron v. Raccio*, Conn. L.J., July 9, 1974, pp. 6, 9 (Conn. Supreme Ct., 1974).

The District Court was clearly within its discretion in finding \$100,000 to be the appropriate amount for destruction of decedent's capacity to carry on life's pleasurable, non-remunerative activities. *Floyd v. Fruit Industries, Inc.*, 144 Conn. 659, 669-670, 676, 136 A.2d 918, 924-25 (1957). Not only did decedent enjoy many activities (App. 55a-57a), but she also had a prospectively long life in which to enjoy them. With a life expectancy of 52 additional years (App. 33a, 80a), the award amounted to \$40 a week. This award is eminently conservative given decedent's happiness, love of life, and variety of active interests, including bicycling, playing tennis, travelling, skiing, entertaining and being entertained, and participating in group activities (Feldman, App. 101a-103a; Bourke, App. 167a; App. 56a).

The modest nature of this award is also underscored by a comparison with a 1973 award of \$75,000 to the estate of a 65 year old man, which was upheld by the Connecticut Supreme Court in *Waldron v. Raccio*, Conn. L.J., July 9, 1974, pp. 6-9. That decedent, at the time of his death, had take-home pay of \$7,234, before deduction of living expenses, and was due to retire in two and a half years. Thus, a substantial part of the \$75,000 recovery must be attributed to the destruction of his capacity to carry on

pleasurable activities during the balance of his life. In contrast, Mrs. Feldman was only 25 years old and had a life expectancy which must have been at least three times that of the decedent in *Waldron*.

Furthermore, the Court's \$100,000 figure tends to overstate somewhat the real value of the award. The overstatement results from the Court's continued deduction of \$5,000 per year in living expenses during decedent's 12 post-retirement years during which the Court credited decedent with no income (App. 65a; 68a). After adjustment for the appropriate discount percentages, the present value of the deductible post-retirement living expenses amounted to about \$31,673 (App. 68a). Since the Court found the decedent would not be receiving any income during this period (App. 52a), those expenditures necessarily would have been made solely by decedent to enjoy life. Thus, it would appear that the real value of the award for the destruction of decedent's capacity to enjoy life is not \$100,000, but \$100,000 minus \$31,673 (the living expenses deduction), or around \$68,000. But quite aside from this last consideration, given decedent's many interests, the Court's finding of \$100,000 for the total destruction of her capacity to enjoy life's activities for 52 more years is certainly not so high that it "shocks the sense of justice." See, *McKirdy v. Cascio*, 142 Conn. 80, 83, 115 A.2d 555, 558 (1955).

As proof of alleged excessiveness, Allegheny urges that if the total award were invested safely at 6%, the heirs to decedent's estate would receive a windfall in annual income, without any impairment of capital (Allegheny Br., pp. 18-19). This argument is faulty on a number of grounds.

First, Allegheny overstates the amount of capital which could be invested, for it ignores attorneys fees which come out of the recovery and are usually substantial. (See *Petition of Marina Mercante Nicaraguense*, 364 F.2d 118, 125

(2d Cir. 1966); *McWeeney v. New York, N.H. & H. R.R. Co.*, 282 F.2d 34, 38 (2d Cir. 1960).

Second, there is no justification for Allegheny's inclusion—in its statement of the capital to be invested—of the \$100,000 award for the destruction of decedent's capacity to enjoy life. This element of damages is separate from the destruction of earning capacity.

Third, even with no deduction for attorneys fees, the \$344,056 (\$444,056 minus \$100,000) invested at 6% would produce an income of about \$20,500 per year, which is well below the \$33,600 which decedent would ultimately receive and only \$5,500 more than decedent's projected starting salary of \$15,040 in Washington (App. 54a-55a).

Fourth, the calculation ignores the ravages of post-accident inflation; by the end of 1974 a dollar had depreciated in value by 27.8% since June 1971 (see Appendix A and A-1 hereto).

Fifth, Allegheny's claim ignores the fact that had it not been for the crash, decedent could have built up an estate to leave to her heirs.

Allegheny's argument is, in fact, an old chestnut which has been rejected many times, perhaps most recently by the *Perry* decision and by the Connecticut Supreme Court. *Perry v. Allegheny Airlines, Inc.*, 489 F.2d 1349, 1353 (2d Cir. 1974) and see Second Circuit Doc. No. 73-1791: Allegheny Brief, p. 23; see also, *Waldron v. Raccio*, Conn. L.J., July 6, 1974, p. 9 (Conn. Supreme Ct. 1974).

Allegheny is frivolous in its complaint that the District Court should have allowed for the "vicissitudes of life" in computing loss of capacity to earn and to enjoy life (Allegheny Br., pp. 17-18). Allegheny itself stipulated not only that decedent was 25 years old and in good health at the time of her death but also that a white female of such age had a life expectancy of 52 additional years (App. 80a,

33a). This expectancy provides more than adequate coverage for the projected top working age of 65 (App. 33a, n. 24). Some individuals may live longer than expected, some may not and life expectancy takes into account just such possibilities.

Beyond that, as the Court noted, the autopsy showed no "abnormalities or indications of disease", her husband testified that her health was excellent, her employer and her husband reported she was rarely absent from work, and she was a good driver (App. 33a, n.24; Feldman, App. 96a, 102a; Cogen, App. 136a). Allegheny failed to introduce any evidence whatsoever that she was prone to any life-shortening "vicissitudes."

Furthermore, Allegheny is precluded from now raising the illusory "vicissitudes" issue, having failed to do so at trial, even in its Motion for a New Trial. *Terkildsen v. Waters*, 481 F.2d 201, 204-205 (2d Cir. 1973). On the contrary, Allegheny's expert, Mr. Curran, made his calculations, both at trial and in his affidavit supporting a new trial, on the basis that decedent would work until 65 and live until 77 (See D. Ex. F, p. 6); Curran Affidavit in Support of Allegheny Motion for New Trial, pp. 10-11; Curran, App. 259a). Thus, the District Court's findings on the length of the prospective working and retirement years were required by the stipulation and the positions of the parties, including those of Allegheny, and cannot now be questioned.

While "no one life is like any other . . .", *Fairbanks v. State*, 143 Conn. 653, 659, 124 A.2d 893, 898 (1956), a comparison with salient facts in the *Perry* award of \$369,400 suggests strongly that the award below was certainly not out of line. In *Perry* the deceased was 38 years old compared with Mrs. Feldman's 25 years. Since each was assumed to retire at 65, the decedent had at least 13 more years of full-time earning capacity. Mr. Perry was earn-

ing \$18,000 as a plant engineer at the time of his death; decedent, 13 years younger, would have earned \$15,040 in her first year in Washington. Mrs. Feldman was in excellent health with unquestioned longevity. Mr. Perry was a diabetic and his health was the subject of controversy. It is true that in *Perry* the jury could have included an award for pain and suffering whereas none was allowed here. Even so, Mrs. Feldman's comparative youth provides, by itself, an adequate explanation for the difference in awards.

But, in any event, the award below was certainly far from excessive. See, e.g., *United States v. 105.22 Acres of Land*, 498 F.2d 8, 9 (2d Cir. 1974). ("Whatever our own views might have been as to fair market value had we been the triers of facts, we cannot say that Chief Judge Blumenfeld's findings were clearly erroneous.")

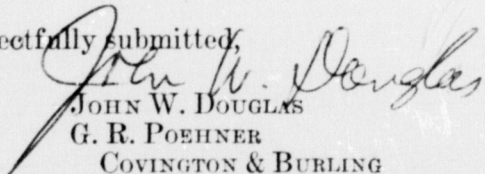
* * * * *

We have urged the basic soundness of the Court's decision and the careful nature of its findings supporting its damage award. In addition, there are other countervailing factors, resolved adversely to plaintiff and referred to in our brief, which attest to the conservatism of the award and which would support a higher judgment than that decided below.

CONCLUSION

The judgment below should be affirmed or the amount of that judgment should be increased. If, nevertheless, there is a remand, it should be so ordered only with instructions to increase the amount of the damages.

Respectfully submitted,


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G. R. POEHNER

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APPENDIX

U.S. DEPARTMENT OF LABOR
BUREAU OF LABOR STATISTICS
WASHINGTON, D.C. 20212

Plaintiff's Appendix A

CONSUMER PRICE INDEX FOR URBAN WAGE EARNERS AND CLERICAL WORKERS

U.S. CITY AVERAGE

ALL ITEMS--SERIES A

(1967 = 100)

YEAR	JAN.	FEB.	MAR.	APR.	MAY	JUNE	JULY	AUG.	SEPT.	OCT.	NOV.	DEC.	AVG.
1946	54.5	54.3	54.7	55.0	55.3	55.9	59.2	60.5	61.2	62.4	63.9	64.4	58.5
1947	64.4	64.3	65.7	65.7	65.5	66.0	66.6	67.3	68.9	68.9	69.3	70.2	66.9
1948	71.0	70.4	70.2	71.2	71.7	72.2	73.1	73.4	73.4	73.1	72.6	72.1	72.1
1949	72.0	71.2	71.4	71.5	71.4	71.5	71.0	71.2	71.5	71.1	71.2	70.8	71.4
1950	70.5	70.3	70.6	70.7	71.0	71.4	72.1	72.7	73.2	73.6	73.9	74.9	72.1
1951	76.1	77.0	77.3	77.4	77.7	77.6	77.7	77.7	78.2	78.6	79.0	79.3	77.8
1952	79.3	78.8	78.8	79.1	79.2	79.4	80.0	80.1	80.0	80.1	80.1	80.0	79.5
1953	79.8	79.4	79.6	79.7	79.9	80.2	80.4	80.6	80.7	80.9	80.6	80.5	80.1
1954	80.7	80.6	80.5	80.3	80.6	80.7	80.7	80.6	80.4	80.2	80.3	80.1	80.5
1955	80.1	80.1	80.1	80.1	80.1	80.1	80.4	80.2	80.5	80.5	80.6	80.4	80.2
1956	80.3	80.3	80.4	80.5	80.9	81.4	82.0	81.9	82.0	82.5	82.5	82.7	81.4
1957	82.8	83.1	83.3	83.6	83.8	84.3	84.7	84.8	84.9	84.9	85.2	85.2	84.3
1958	85.7	85.8	86.4	86.6	86.6	86.7	86.8	86.7	86.7	86.7	86.8	86.7	86.6
1959	86.8	86.7	86.7	86.8	86.9	87.3	87.5	87.4	87.7	88.0	88.0	88.0	87.3
1960	87.9	88.0	88.0	88.5	88.5	88.7	88.7	88.7	88.8	89.2	89.3	89.3	88.7
1961	89.3	89.3	89.3	89.3	89.3	89.4	89.8	89.7	89.9	89.9	89.9	89.9	89.6
1962	89.9	90.1	90.3	90.5	90.5	90.5	90.7	90.7	91.2	91.1	91.1	91.0	90.6
1963	91.1	91.2	91.3	91.3	91.3	91.7	92.1	92.1	92.1	92.1	92.2	92.3	91.7
1964	92.6	92.5	92.6	92.7	92.7	92.9	93.1	93.0	93.2	93.3	93.5	93.6	92.9
1965	93.6	93.6	93.7	94.0	94.2	94.7	94.8	94.6	94.6	94.9	95.1	95.4	94.5
1966	95.4	96.0	96.3	96.7	96.8	97.1	97.4	97.9	98.1	98.5	98.5	98.6	97.2
1967	98.6	98.7	98.9	99.1	99.4	99.7	100.2	100.5	100.7	101.0	101.3	101.6	100.0
1968	102.0	102.3	102.8	103.1	103.4	104.0	104.5	104.8	105.1	105.7	106.1	106.4	104.2
1969	106.7	107.1	108.0	108.7	109.0	109.7	110.2	110.7	111.2	111.6	112.2	112.9	109.8
1970	113.3	113.9	114.5	115.2	115.7	116.3	116.7	116.9	117.5	118.1	118.5	119.1	116.3
1971	119.2	119.4	119.8	120.2	120.8	121.5	121.8	122.1	122.2	122.4	122.6	123.1	121.3
1972	123.2	123.8	124.0	124.3	124.7	125.0	125.5	125.7	126.2	126.6	126.9	127.3	125.3
1973	127.7	128.6	129.8	130.7	131.5	132.4	132.7	133.1	133.5	133.6	133.6	133.5	133.1
1974	139.7	141.5	143.1	143.9r	145.5r	146.9r	148.0r	149.9r	151.7r	153.0r	154.3		
1975													
1976													
1977													
1978													
1979													
1980													

r - revised from previously published figure.

(PLAINTIFF'S APPENDIX A)

NEWS



U. S. DEPARTMENT OF LABOR BUREAU OF LABOR STATISTICS

(PLAINTIFF'S APPENDIX A-1)

Washington, D.C. 20212
T. Nakayama (202) 961-4317
961-3965
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USDL-75-37
FOR RELEASE: 10:00 A.M. (EST)
Tuesday, January 21, 1975

THE CONSUMER PRICE INDEX--DECEMBER 1974

The Consumer Price Index rose 0.7 percent in December to 155.4 (1967=100), the Bureau of Labor Statistics of the U.S. Department of Labor reported today. Higher prices for sugar and most other types of food, housekeeping supplies, gas and electricity, and public transportation were responsible for a large part of the December rise. The effect of these increases was partially offset by declines in prices for beef, fresh fruits and vegetables, clothing, and used cars.

On a seasonally adjusted basis, the rise in the December CPI was 0.7 percent; this compares with 0.9 percent in each of the two preceding months. The food index rose 0.7 percent after seasonal adjustment in December, the smallest increase in 5 months. The December increase of 0.4 percent for the nonfood commodities index was the smallest monthly rise in 1974. The services index rose 0.9 percent, about the same as in October and November.

Table A. Percent changes in CPI and components, selected periods

Month	Changes from preceding month							Changes in all items	
								compound annual rate	From 12 mos. ago
	All items		Food		Commodities less food		Services	From 3 mos. ago	
	Unadj.	Seas. adj.	Unadj.	Seas. adj.	Unadj.	Seas. adj.	Unadj.	Seasonally adjusted	Unadj.
Dec. 1973	0.7	0.6	0.9	0.5	0.6	0.6	0.6	9.2	8.8
Jan. 1974	.9	1.1	1.6	1.7	.6	1.3	.7	10.2	9.4
Feb.	1.3	1.2	2.5	2.2	1.0	1.1	.7	12.2	10.0
Mar.	1.1	1.1	1.0	.6	1.5	1.4	.8	14.2	10.2
Apr. ....	.6	.5	-.3	-.4	1.1	.9	.6	11.7	10.1
May	1.1	1.1	.7	.9	1.4	1.1	1.0	11.0	10.6
June	1.0	.9	.4	.3	1.3	1.2	1.0	10.3	11.0
July ....	.7	.7	.1	-.4	1.0	1.3	1.1	11.1	11.5
Aug.	1.3	1.3	1.4	1.4	1.3	1.5	1.1	12.4	11.0
Sept.	1.2	1.3	1.4	1.9	1.1	1.0	1.1	14.2	12.0
Oct. ....	.9	.9	.7	1.3	.9	.6	.9	15.0	12.0
Nov. ....	.8	.9	1.0	1.4	.8	.8	.8	13.0	12.1
Dec. ....	.7	.7	1.1	.7	.4	.4	.9	10.1	12.2

Plaintiff's Appendix A-1



Subchapter 1. Introduction to Pay Under the General Schedule

I-1. INTRODUCTION

a. Introduction. Subchapter III of chapter 53 of title 5, United States Code, provides the framework for a pay system under which the rate of basic pay for an employee typically is derived from a pay schedule of rates fixed by law for each grade. With the exception of grade GS-18, each grade has a minimum and a maximum basic pay rate, and a limited number of within-grade rates specified by law for each grade. This chapter describes how a rate of basic pay is determined under the General

Schedule, with sufficient explanation to meet the needs of most personnel officers and generalists. For more specific instructions, see FPM SUPPLEMENT 990-2.

b. Pay schedules. Section 5332 of title 5, United States Code, provides that pay for employees and positions subject to subchapter III of chapter 53 of title 5, United States Code, shall be in accordance with the General Schedule. The General Schedule is as follows:

Grade	Pay Rates										Amt. of within-grade increase
	1	2	3	4	5	6	7	8	9	10	
GS-1...	\$4,326	\$4,470	\$4,614	\$4,758	\$4,902	\$5,046	\$5,190	\$5,334	\$5,478	\$5,622	\$144
GS-2...	4,897	5,060	5,223	5,386	5,549	5,712	5,875	6,038	6,201	6,364	163
GS-3...	5,524	5,708	5,892	6,076	6,260	6,444	6,628	6,812	6,996	7,180	184
GS-4...	6,202	6,409	6,616	6,823	7,030	7,237	7,444	7,651	7,858	8,065	207
GS-5...	6,955	7,169	7,400	7,631	7,862	8,093	8,324	8,555	8,786	9,017	231
GS-6...	7,727	7,985	8,243	8,501	8,759	9,017	9,275	9,533	9,791	10,049	255
GS-7...	8,552	8,868	9,154	9,440	9,726	10,012	10,298	10,584	10,870	11,156	286
GS-8...	9,493	9,809	10,125	10,441	10,757	11,073	11,389	11,705	12,021	12,337	316
GS-9...	10,470	10,819	11,168	11,517	11,866	12,215	12,564	12,913	13,262	13,611	349
GS-10...	11,517	11,901	12,285	12,669	13,053	13,437	13,821	14,205	14,589	14,973	384
GS-11...	12,615	13,036	13,457	13,878	14,299	14,720	15,141	15,562	15,983	16,404	421
GS-12...	13,840	14,341	14,842	15,343	15,844	16,345	16,846	17,347	17,848	18,349	501
GS-13...	17,761	18,353	18,945	19,537	20,129	20,721	21,313	21,905	22,497	23,089	592
GS-14...	20,815	21,509	22,203	22,897	23,591	24,285	24,979	25,673	26,367	27,061	694
GS-15...	24,251	25,059	25,867	26,675	27,483	28,291	29,099	29,907	30,715	31,523	803
GS-16...	28,129	29,067	30,005	30,943	31,881	32,819	33,757	34,695	35,633		938
GS-17...	32,546	33,681	34,716	35,801	36,886						
GS-18...	37,624										

The salary for employees at these rates is limited by 5 U.S.C. 5308 to the rate for level V of the Executive Schedule as of the effective date of this salary adjustment, \$36,000). ←

Title 3—The President

EXECUTIVE ORDER 11811

Adjusting Rates of Pay for Certain Statutory Pay Systems

By virtue of the authority vested in me by subchapter I of chapter 53 of title 5 of the United States Code, it is hereby ordered as follows:

General Schedule

Section 1. The rates of basic pay in the General Schedule contained in section 5332(a) of title 5 of the United States Code are adjusted as follows:

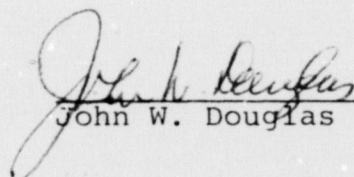
"GENERAL SCHEDULE

"Grade	"Annual rates and steps									
	1	2	3	4	5	6	7	8	9	10
GS-1	\$5,294	\$5,470	\$5,646	\$5,822	\$5,998	\$6,174	\$6,350	\$6,526	\$6,702	\$6,878
GS-2	5,996	6,196	6,396	6,596	6,796	6,996	7,196	7,396	7,596	7,796
GS-3	6,764	6,989	7,214	7,439	7,664	7,889	8,114	8,339	8,564	8,789
GS-4	7,596	7,849	8,102	8,355	8,608	8,861	9,114	9,367	9,620	9,873
GS-5	8,500	8,783	9,066	9,349	9,632	9,915	10,198	10,481	10,764	11,047
GS-6	9,473	9,789	10,105	10,421	10,737	11,053	11,369	11,685	12,001	12,317
GS-7	10,520	10,871	11,222	11,573	11,924	12,275	12,626	12,977	13,328	13,679
GS-8	11,640	12,028	12,416	12,804	13,192	13,580	13,968	14,356	14,744	15,132
GS-9	12,841	13,269	13,697	14,125	14,553	14,981	15,409	15,837	16,265	16,693
GS-10	14,117	14,588	15,059	15,530	16,001	16,472	16,943	17,414	17,885	18,356
GS-11	15,481	15,997	16,513	17,029	17,545	18,061	18,577	19,093	19,609	20,125
GS-12	18,463	19,078	19,693	20,308	20,923	21,538	22,153	22,768	23,383	23,998
GS-13	21,816	22,543	23,270	23,997	24,724	25,451	26,178	26,905	27,632	28,359
GS-14	25,581	26,434	27,287	28,140	28,993	29,846	30,699	31,552	32,405	33,258
GS-15	29,818	30,812	31,806	32,800	33,794	34,788	35,782	36,776*	37,770*	38,764*
GS-16	34,607	35,761	36,915*	38,069*	39,223*	40,377*	41,531*	42,685*	43,839*	
GS-17	40,062*	41,397*	42,732*	44,067*	45,402*					
GS-18	46,336*									

"*The rate of basic pay for employees at these rates is limited by section 5308 of title 5 of the United States Code to the rate for level V of the Executive Schedule (as of the effective date of this pay adjustment, \$36,000)."

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing brief of Plaintiff upon the Defendant by mailing a copy thereof, by first-class mail, postage prepaid to Defendant's attorney, Wesley W. Horton, Esq., Regnier, Moller & Taylor, 41 Lewis Street, Hartford, Connecticut.


John W. Douglas

February 14 , 1975.

